

United States of America
SUPREME COURT

Original—October Term, 1940

Ex Parte CLEIO HULL,
Petitioner.

RETURN TO RULE TO SHOW CAUSE

HERBERT J. RUSHTON,
Attorney General,

EDMUND E. SHEPHERD,
Solicitor General,

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Assistant Attorney General,
Capitol,
Lansing Michigan.

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United States of America SUPREME COURT

Original—October Term, 1940

Ex Parte CLEIO HULL,

Petitioner.

RETURN TO RULE TO SHOW CAUSE

In obedience to the rule to show cause issued by this court in this cause on January 7, 1941, I, Harry H. Jackson, Warden of the State Prison of Southern Michigan, located at Jackson, Michigan, do hereby certify and return:

1. On January 20, 1936, the petitioner, Cleio Hull, was convicted on his plea of guilty of the crime of indecent liberties as charged in an information filed against him in the Circuit Court for the County of Jackson, State of Michigan.

2. Section 336 of the Penal Code of the State of Michigan (Act 328, Public Acts of 1931; Section 28.568, Michigan Statutes Annotated) defines this crime as follows:

“Any male person or persons over the age of sixteen years, who shall assault a female child under the age of sixteen years, and shall take indecent and improper liberties with the person of such child, without committing or intending to commit the crime of rape upon such child, shall be guilty of a

felony, punishable by imprisonment in the state prison not more than ten years or by fine of not more than five thousand dollars."

3. On January 20, 1936, in accordance with said statute the petitioner was sentenced by Honorable Benjamin Williams, Circuit Judge of the County of Jackson, to be confined in the State Prison of Southern Michigan for the maximum period of ten years and a minimum period of six months from and including said date (January 20, 1936), with no recommendation as to the maximum term to be served, as appears by the certified copy of the sentence of said court hereto attached as Exhibit "A".

4. On October 30, 1936, after serving the minimum sentence, less good time allowance, said petitioner became eligible for parole and was on said date released on parole as appears by the copy of the parole board certificate hereto attached as Exhibit "B".

5. On October 6, 1937, the petitioner, Cleio Hull, was convicted by verdict of a jury and found guilty of the crime of gross indecency as charged in an information filed against him in the Circuit Court for the County of Jackson and State of Michigan, a certified copy of said information being hereto attached as Exhibit "C".

6. Section 338 of the Penal Code of the State of Michigan (Act 328, Public Acts of 1931; Section 28.570, Michigan Statutes Annotated) defines this crime as follows:

"Any male person who, in public or private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another

male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five years or by a fine of not more than two thousand five hundred dollars."

7. On October 16, 1937, said Cleio Hull presented to the trial court his motion for a new trial, on grounds therein fully set forth, a certified copy of said motion being hereto attached as Exhibit "D".

8. On November 1, 1937, the motion for a new trial was denied for reasons fully set forth in the opinion of the trial court, a certified copy of which is hereto attached as Exhibit "E".

9. On November 1, 1937, said Cleio Hull was sentenced by the Honorable John Simpson, Circuit Judge of the County of Jackson, to be confined in the State Prison of Southern Michigan for the maximum period of five years and for the minimum period of two and one-half years, from and including said day (November 1, 1937), with no recommendation as to the maximum term to be served, as appears by a certified copy of the sentence of said court hereto attached as Exhibit "F".

10. By reason of this second conviction, said Cleio Hull was a parole violator and was proceeded against in accordance with the provisions of Section 8, Chapter III, Act No. 255, Michigan Public Acts of 1937 (Section 28.2108, Michigan Statutes Annotated Supplement). He was brought before the parole board of the State of Michigan on December 13, 1937, and a hearing was had. It was ordered that he be passed indefinitely toward the maximum sentence of ten years imposed by the court upon his conviction upon his plea of guilty as set forth in

Paragraphs 1 through 4 of this return. The details of the parole board hearing and action of the parole board are fully set forth in the copy thereof hereto attached as Exhibit "G". Said Cleio Hull is, therefore, at this time in custody as a parole violator, serving the maximum term of ten years under the sentence imposed upon him on January 20, 1936, as shown by Exhibit "A" hereto attached.

11. On May 9, 1940, Cleio Hull filed in the Supreme Court of the State of Michigan his petition for a writ of certiorari and for other relief in connection with his second conviction. This petition was supported by a transcript of all testimony taken at his examination and trial and numerous other documents and exhibits. After due consideration of this petition and the material filed in support thereof, the Supreme Court of the State of Michigan denied certiorari on June 4, 1940, by its order, a certified copy of which is hereto attached as Exhibit "H".

12. For further answer and return, it is respectfully submitted that investigation and experience has revealed that certain inmates within the State Prison of Southern Michigan had heretofore undertaken the preparation and filing of petitions for writs of habeas corpus and for other relief on behalf of certain other inmates, representing that the same were prepared by said inmates in proper person, and filed in forma pauperis. Many of said petitions were in fact prepared for a consideration by a certain inmate of said institution who was attempting to practice law within the prison, and who was soliciting other inmates to employ him in preparing and filing these champertous petitions.

13. The preparing and filing of these numerous petitions had a detrimental effect on prison morale and raised false hopes of release in the minds of the petitioning inmates. In addition, many of these petitions were not properly prepared, and upon motion were dismissed. It became necessary that steps should be taken to prevent the Supreme Court of the State of Michigan and the Supreme Court of the United States of America from being burdened with these faulty and often facetious petitions. On the other hand, it was recognized that the privilege of writ of habeas corpus could not be suspended.

14. For the reasons stated in Paragraphs 12 and 13, there was promulgated by the Warden of the State Prison of Southern Michigan the following rule:

"All legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals will first have to be submitted to the institutional welfare office and if favorably acted upon be then referred to Perry A. Maynard, legal investigator to the Parole Board, Lansing, Michigan.

"Documents submitted to Perry A. Maynard, if in his opinion are properly drawn, will be directed to the court designated or will be referred back to the inmate."

15. It is submitted that this rule does not in anywise suspend, suppress or confiscate the constitutional privilege of application for a writ of habeas corpus. It is merely a reasonable regulation of means to be used in exercising this privilege by certain persons and under certain circumstances. It is necessary for the proper administration of the State Prison of Southern Michi-

gan. It will prevent the raising of false hopes in the minds of inmates of that institution, which is detrimental to the morale of the institution. It will protect and preserve to those inmates, who in good faith prepare and file petitions in proper person and in their own behalf, the right to a writ of habeas corpus by giving them suggestions as to the proper form and requisites of such documents.

16. Petitioner makes no showing in his petition that he attempted to comply with this rule. He did not submit his petition to the institutional welfare office or the legal adviser of the Parole Board of the State of Michigan for examination and approval as shown by the affidavit hereto attached as Exhibit "I". Instead he insisted upon attempting to mail this petition for filing, without complying with this rule. Failing in this, he then attempted through the agency of his father, Claude C. Hull, to circumvent the rule and file the petition without complying therewith. The document referred to in Paragraph 4 of the petition filed herein was returned to the petitioner. In order that this court might be fully advised of the form, contents and character of this petition an attempt was made to obtain the petition, have copies thereof made, and attach them to this answer and return. Said petitioner, however, refused to permit said petition to be borrowed or to permit copies thereof to be made and filed in this court.

Finally, it is respectfully submitted that petitioner's contention is not in accordance with law; that he is legally in custody; that he has in no wise been deprived of due process of law, or of any right guaranteed him by the constitution of the United States or the constitution

of the State of Michigan. It is therefore submitted that this petition should be denied and dismissed.

Dated January 20, 1941.

(Signed) HARRY H. JACKSON,
Warden of the State Prison of
Southern Michigan.

EXHIBIT "A"

Copy of Record of Sentence on Plea of Guilty

AT A SESSION OF THE CIRCUIT COURT FOR
the County of Jackson, in the State of Michigan, held at
the Court House in the City of Jackson in said County,
on Monday the 20th day of January A. D. 1936.

Present, Hon. Benjamin Williams, Circuit Judge.

THE PEOPLE OF THE STATE
OF MICHIGAN,

vs.

CLEIO HULL.

The Respondent in this cause, having been, upon his plea of guilty duly convicted of the crime of Indecent Liberties as appears by the record thereof; and the Court having examined into the facts of the case, and having also privately examined the respondent concerning the circumstances which induced him to plead guilty, and having therefrom ascertained that said plea was made freely, with full knowledge of the nature of the accusation

and without undue influence; and the respondent, thereafter having been, on motion of the Prosecuting Attorney, brought to the bar of the Court for sentence, and having then and there been asked by the Court if he had anything to say why judgment should not be pronounced against him, and alleging no reason to the contrary.

Therefore: It is ordered and adjudged by the Court, now here that the said Cleio Hull, Southern Michigan Prison, Blackman Twp., be confined in the

Detroit House of Correction
Michigan Reformatory at Ionia
Michigan State Prison
Branch State Prison at Marquette

in this State, at hard labor, for the maximum period of ten years and for the minimum period of six months from and including this day.

And the said Circuit Judge pursuant to the statute in such case made and provided, does hereby recommend and state that in his judgment imprisonment for the term of years would be a proper maximum penalty in this case.

BENJAMIN WILLIAMS,
Circuit Judge.

STATE OF MICHIGAN }
COUNTY OF JACKSON } ss.

I, B. E. Burnett, Clerk of said County and of the Circuit Court thereof, do hereby certify that the above and foregoing is a true copy of the record of sentence in the case of the People of the State of Michigan vs. Cleio Hull

in said Court, and the whole of the same as examined and compared by me with the original, now on record in my office.

In TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Circuit Court of said County, at the City of Jackson, this 20th day of January A. D. 1936.

(Signed) B. E. BURNETT, Clerk.

STATE OF MICHIGAN }
COUNTY OF JACKSON } ss.

Ronald G. Wilkins, being first duly sworn, deposes and says that he is Record Clerk of the State Prison of Southern Michigan at Jackson, Michigan, and certifies that the attached is a true copy of the record of sentence on file in said Institution in the case of Cleio Hull sentenced from the Circuit Court of Jackson County, Jackson, Michigan, on January 20, 1936.

RONALD G. WILKINS, Record Clerk
State Prison of Southern Michigan.

Subscribed and sworn to before me
this 15th day of January, 1940.

FRANK J. NEILS,
Notary Public, Jackson County, Michigan.
Commission expires 3-12-1944.

EXHIBIT "B"

STATE OF MICHIGAN
EXECUTIVE DEPARTMENT

FRANK D. FITZGERALD

GOVERNOR IN AND OVER THE STATE OF
MICHIGAN

TO HARRY H. JACKSON, Warden of the SOUTHERN
MICHIGAN PRISON:

WHEREAS, it is desired to test the ability of CLEIO HULL, No. 38198, an inmate of the SOUTHERN MICHIGAN PRISON to refrain from crime and lead an honorable life;

AND WHEREAS, it has been provided that SGT. GUY BAUGH of MICHIGAN STATE POLICE, JACKSON, Michigan, shall act as first friend and adviser for the above named prisoner and report for him during the parole period specified;

NOW THEREFORE, know ye, that I, Frank D. Fitzgerald, Governor as aforesaid by virtue of the power and authority in me vested by law, DO HEREBY PAROLE said CLEIO HULL and permit him to go at large outside the buildings and enclosures of said PRISON and within JACKSON County, MICHIGAN, for an INDEFINITE period or until further orders.

AND I DO HEREBY REQUIRE, That upon the production and exhibition to you of these presents, the said prisoner be forthwith allowed to proceed to the place of employment provided for him.

And you are hereby required to make due return hereof, with your doings herein, according to law.

And you are further required to deliver a copy of this permit to said prisoner when paroled.

MUST REFRAIN FROM USE OF LIQUOR.

Signed and delivered by the Commissioner of Pardons and Paroles at Lansing, this THIRTIETH day of OCTOBER in the year of our Lord one thousand nine hundred and thirty SIX, at the direction of Frank D. Fitzgerald, Governor of the State of Michigan.

(Signed) JOSEPH C. ARMSTRONG,
Commissioner of Pardons and Paroles.

RULES AND REGULATIONS GOVERNING THE CONDUCT OF PRISONERS WHILE ON PAROLE

Rule 1. The paroled prisoner shall at once report to his designated First Friend for instructions as to residence and work. In case he find it necessary to change his employment or residence he shall first obtain the written consent of the Governor through his First Friend.

Rule 2. He shall at the end of each month, until his final release, make a written report to his First Friend, stating whether he has been constantly at work during the month, and if not, why not; how much he has earned, and how much he has expended, together with a general statement as to his surroundings and prospects.

Rule 3. He shall in all respects conduct himself honestly, avoid evil associations, and in general pursue the course of a law-abiding citizen.

Rule 4. He shall abstain from the use of all intoxicating liquors as a beverage.

Rule 5. He shall not leave the State without permission from the Governor.

Rule 6. He shall, while on parole, remain in the legal custody and under the control of the Governor of the State.

Rule 7. He shall be liable to be retaken and again confined within the enclosure of the prison from which he was paroled for any reason or reasons that will be satisfactory to the Governor, and at his sole discretion, until he receives a copy of his final discharge.

Rule 8. If he fails to report to his First Friend on the last of each month, or is guilty of doing any acts prohibited by the prison rules, he will be subject to forfeitures.

Rule 9. If he fails to return to the prison enclosure when required by the Governor so to do, or if he makes escape while on parole, he will be treated in all respects as if he had escaped from the prison enclosure.

Rule 10. In case he finds it necessary to leave the county to which he is paroled for any purpose, he shall first obtain the written consent of the Governor through his First Friend.

EXHIBIT "C"

FILED CLERK'S OFFICE

OCT. 2, '37

MURL K. ATEN, COUNTY CLERK

..... DEPUTY

STATE OF MICHIGAN

THE CIRCUIT COURT FOR THE COUNTY OF
JACKSON

Of the September Term in the year A. D. 1937.

COUNTY OF JACKSON, ss.

Edward F. Behan, Prosecuting Attorney in and for the County of Jackson aforesaid, for and in behalf of the People of the State of Michigan, comes into said Court, in the September Term thereof, in the year A. D. 1937, and gives the Court here to understand and be informed that Cleo Hull late of the Township of Summit, in the County of Jackson and State of Michigan, heretofore, to-wit: On the 1st day of August A. D. 1937 at the Township of Summit in the County of Jackson aforesaid being a male person did in public or private and was a party to the commission of and procures or attempts to procure the commission by any male persons an act of gross indecency with other male persons, to-wit: Robert Pickell age 14 years and Vernon Cook age 12 years.

The Prosecuting Attorney further complaining says that heretofore, to-wit: on the 1st day of August A. D. 1937 in the Township of Summit, State of Michigan, Cleo Hull being

a male person over the age of 15 years, did debauch and deprave the morals of two boys under the age of fifteen years, to-wit: Robert Pickell of the age of 14 years and Vernon Cook of the age of 12 years, by enticing and soliciting such boys to commit the abominable and detestable crime against nature with a man, to-wit: Cleo Hull

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

EDWARD F. BEHAN,
Prosecuting Attorney.

People's Witnesses

Robert Pickell

Vernon Cook

Harry Horthrop

EXHIBIT "D"

FILED CLERK'S OFFICE

OCT. 16, '37

MURL K. ATEN, COUNTY CLERK

..... Deputy

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF JACKSON
IN CHANCERY

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff,

vs.

CLEO HULL,

Defendant.

NOTICE OF HEARING

To—Edward Behan, Prosecuting Attorney:

YOU WILL PLEASE TAKE NOTICE that on Monday the 25th day of October, 1937, at the Court House in the City of Jackson, upon the opening of Court on said day, or as soon thereafter as counsel can be heard, I shall move the Court for an order in conformity with the prayer of plaintiff's motion.

This motion will be based upon the files and records in

this cause and on the verified copy of the petition, a copy of which you are hereby served with.

HERBERT N. HEUMAN,
Attorney for Defendant,
308 Dwight Bldg.,
Jackson, Michigan.

Dated—October 16, 1937.

FILED CLERK'S OFFICE

OCT. 16, '37

MURL K. ATEN, COUNTY CLERK

..... Deputy

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF JACKSON

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff,

vs.

CLEO HULL,

Defendant.

MOTION FOR NEW TRIAL

Now comes the defendant, Cleo Hull by his attorney, Herbert N. Heuman, and moved the Honorable Court to enter an order granting to said defendant a new trial in the above entitled cause and to set aside the verdict entered therein against said defendant for the following reasons.

1. That the verdict is against the weight of evidence in that the defendant was not found guilty as charged.

2. That the jury was instructed under the rule set forth in *People vs. Swift*, 172 Michigan, page 473. "That in this case the offense is charged under a *videlicet* as occurring heretofore, to-wit, on the 1st day of August, A. D. 1937. That time was not of the essence of this offense. It could be stated in the information as one time and the proof might show another." That in the case cited the witness was unable to give the exact date. However, in the above entitled cause both at the time of examination and throughout the testimony at the trial August 1, 1937, was specifically the date claimed by the prosecution and testified to by the complaining witnesses. That in this cause a notice of alibi was filed specifying that the defendant was not at the scene of the crime on the day charged. That the prosecution had every opportunity to show that the crime might have been committed on some other day. That the prosecution made no effort to show that the crime was committed on some other day.

3. That the jury had no right to consider the possibility of the crime having been committed on some other day. That there was no evidence before the jury that the crime had been committed on any other day and the fact that the crime must have been committed on some other day, if committed at all, was sufficient to force the jury to bring out a verdict of not guilty unless there was evidence before the jury that the crime had been committed on another day. That in the case of the *People vs. Swift* there was testimony to show that the crime had been committed "a little before Thanksgiving Day," but in the case herein there is nothing to show but what the crime

was committed on the 1st day of August, 1937, if committed at all.

4. That because of the foregoing discrepancies between the case herein and the case of the People vs. Swift the Court erred in instructing the jury according to the law of the People vs. Swift. That time was of the essence of this offense because this offense was not as in the People vs. Swift a repeated and continuing one, but as a matter of fact was charged as a single occurrence happening on a specified day and at a specified time of day. That in this case there was 2 complaining witnesses and there was no variance in their testimony as to the time of day or as to the day of the year. That the testimony herein showed that the defendant was arrested within a very few days after the complaint was made and that there was an examination herein within 13 days after the crime was alleged to have been committed and within such a short space of time there could be little opportunity for a mistake in date and that throughout the testimony herein there was nothing to show there was any question as to the date as far as the prosecution side of the case was concerned.

5. That although the defendant was charged under a videlicet to indicate the prosecution did not undertake to prove the precise circumstances alleged and although the prosecution is not required to prove them as such that nevertheless the prosecution did claim to prove that the crime was committed on a specified day. That the nature of the crime herein was one to which there can be no defense except an alibi. That the defendant's only opportunity for a defense is to prove that he was elsewhere than the place where the crime was committed at

the time the crime was alleged to have been committed and that therefore unless the jury had some evidence on which to find that the crime was committed on another day it was their duty to return a verdict of not guilty and the jury should have been so charged.

6. That the law as set forth in *People vs. Swift* where under the evidence it shows that there is proof that the crime was committed on a day other than that charged by the prosecution, the jury is permitted to find the defendant guilty but that case turns on actual proof that the crime was committed on another day or upon proof that there was any question in the minds of the witnesses as to the exact day, giving the jury an opportunity to act wherein it has evidence to act upon. In the case herein the jury had nothing to act upon except a supposition that if the crime was not committed on the 1st day of August, 1937, that it must have been committed on some other day. Even under the law of the *People vs. Swift* the jury cannot find the defendant guilty on this assumption but must have some evidence to show that the crime was committed on another day or that there was some doubt as to the day that the crime was committed.

This motion is based upon the records and files of this cause and the Court is respectfully requested to give their reasons in writing in the event of a denial of this motion.

HERBERT N. HEUMAN,
Attorney for Defendant,
308 Dwight Bldg.,
Jackson, Michigan.

October 16, 1937.

EXHIBIT "E"

FILED CLERK'S OFFICE

NOV. 1, '37

MURL K. ATEN, COUNTY CLERK

..... Deputy

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF
JACKSON

THE PEOPLE OF THE
STATE OF MICHIGAN,

v.

CLEO HULL,

Defendant.

OPINION

This is a motion for a new trial. Counsel for the defendant cites six reasons, but the only reason that the Court can draw from them is the claim that the prosecution should have been held to the particular day set forth in the information.

The date in the information was placed under a *videlicet*. The defendant waived examination in the lower court, and the date in the complaint and warrant was also based under a *videlicet*.

This is one of those offenses where time is not of the essence of the offense. The two complaining witnesses

testified that at the time this offense occurred, the glass in the defendant's windshield was broken. The defendant brought in the records of the Walker-Olds Company to show that the car was repaired on July 26, 1937.

Some of the boys that were called in as alibi witnesses also were not particularly definite in their date. Also the testimony as to what happened on the evening of August 1st is not entirely specific and definite, and the offense might have occurred on that night in question after these boys disbanded.

The Court is of the opinion that the case falls within the case of *People vs. Swift*, 172 Mich. 473, and *People vs. Whittemore*, 230 Mich. 435. See also Section 17259, C. L. of 1929, sub-section 2, and Section 17265. As stated in *People vs. Whittemore*, "A videlicet avers a date tentatively, and unless a particular day or date is essential to a crime, there is no variance if the evidence shows that the very crime charged was actually committed on a different date."

Under this subject, see *Turner vs. People*, 33 Mich. 363; *People vs. Nichols*, 159 Mich. 355; *People vs. Townsend*, 214 Mich. 267.

Therefore the motion is denied.

(SEAL)

JOHN SIMPSON,
Circuit Judge.

November 1, 1937.

EXHIBIT "F"

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF JACKSON

Monday, November 1, 1937.

Present the Honorable John Simpson, Circuit Judge.

Court was opened for business in due form.

PEOPLE OF THE STATE OF MICHIGAN, vs. CLEO HULL, Defendant.	}
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In this cause, a motion by Herbert Heuman, attorney for the defendant, for a new trial having been made and after being duly argued, it is ordered by the court now here that the said motion be and the same hereby is denied.

PEOPLE OF THE STATE OF MICHIGAN, vs. CLEO N. HULL, Defendant.	}
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Cleo Hull, the defendant in this cause; having heretofore been convicted by the jury of the crime of Gross Indecency, as appears by the record thereof and having been on motion of Irwin Bannasch, assistant prosecuting

attorney, brought to the bar of the court for sentence and having there been asked by the court if he had anything to say why judgment should not be pronounced against him and alleging no reason to the contrary, therefore it is ordered and adjudged by the court now here that the said Cleo Hull be confined in the State Prison of Southern Michigan for the minimum period of two and one-half (2½) years, and for the maximum period of five (5) years, from and including this day with no recommendation. Whereupon the said defendant was remanded to the custody of the sheriff to carry his sentence into execution.

The court transacted such other business as was presented and adjourned until tomorrow at the hour of nine o'clock A. M.

JOHN SIMPSON,
Circuit Judge.

STATE OF MICHIGAN)
County of Jackson) ss.

OFFICE OF THE COUNTY CLERK

I, James Cameron, Clerk of the County of Jackson, and of the Circuit Court thereof, the same being a Court of Record, having a seal, do hereby certify that I have compared the foregoing copy of Information; Record of sentence; Motion for new trial; opinion of the Court entered in Liber Q, page 63, with the original of record in

my office, and that the same is a correct transcript therefrom, and the whole of such original.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Circuit Court for the County of Jackson, at the city of Jackson, this, sixteenth day of January in the year of our Lord one thousand nine hundred and forty-one.

JAMES CAMERON,
County Clerk.

EXHIBIT "G"
STATE OF MICHIGAN
REPORT OF PAROLE VIOLATION

Hearing at Jackson Date19.....

Name Cleio Hull, Alias 38198 J, No. 40825-J

When Sentenced 1-20-36, Min. 1½, Max. 10 Rec.....

Formal Charge Indecent Liberties, County Jackson

When Paroled 10-30-36, Parole Period Indefinite

Date of Violation 11-1-37, Warrant Issued.....

Date of Return 11-1-37

Corrected Expiration of Maximum Sentence.....

COMPLAINT OF VIOLATION:

11-1-37, Jackson County, 2½-5 years, gross indecency,
No. 40825.

STATEMENT OF SUPERVISOR OF PAROLES:

DATE December 8, 1937

While on parole, this subject incurred the following new sentence: On November 1, 1937, this subject was sentenced from Jackson County to serve 2½ to five years for gross indecency, No: 40825 Jackson. This case should be handled in accordance with Section 8, Chapter 3, Act 255, Public Acts of 1937, which requires service of the original term before commencing the new sentence.

RALPH E. BENSON (Signed)
Deputy Assistant Director In
Charge of Supervision.

ACTION BY PAROLE BOARD:

Dec. 13, 1937. Subject appears in the presence of the full Parole Board except M. Hubert O'Brien, Chairman, who was absent; also present, Wm. Emmons, Clerk, Southern Michigan Prison, Jackson, Mich., and reporter (WBC)

This is a Parole Violator. Mr. Bush: You were sentenced first for Indecent Liberties and paroled on that sentence in November of 1935. You were originally given six months to ten years. He says he was first given six months to five years and then was re-sentenced to six months to ten years. It was a statutory requirement. He was paroled at the expiration of his minimum sentence. Just one year later he was picked up on a charge of gross indecency wherein two boys were involved. He had a jury trial. These boys both testified he had taken

liberties with them. Inmate says that in the first place this was at Vandercook Lake (near Jackson, Mich.) and the boys were Robert Pickell aged 14 and Vernon Cook aged 12 years and he says he had known these boys for five years. On or about July 10th he had an accident with his car cracked the fender on the right hand side. They—these boys— saw this car and there had been an automobile stolen down to the park. These boys came down there and had some pontoons they wanted to take the boats and he wouldn't let them. They then threw stones at the boats. He placed his car in a garage on July 24th and the boys didn't see the car again until August 2nd. They identified the fact that the car was in a wrecked condition. They said that a boy named Leon Kellogg had told this young Cook to tell his father. Along about supper-time Mr. Cook came to inmate's father and said he was going to have inmate arrested for keeping these two boys out all night in some house. Inmate gave himself up to Sg. Ball on August 4th about 8:30 P. M. Mr. Cook got out the warrant on August 2nd. He was arraigned and the examination was set for Aug. 13th. The date of this offense was definitely set by these boys as about August 1st. Judge Simpson and the prosecutor talked this matter all over and looked over the evidence in the lower court. On this warrant was charged abomination of man or beast and the date was still left on as 1:00 a. m., of August 1st. Inmate says he waived examination and was advised that testimony on the previous arraignment would be allowed as of a previous trial. He filed notice of an alibi. They had Harold Baldy and two others, as witnesses. They claimed they were with these two boys until Deputy Sheriff Abbott and his wife picked these boys up and made them all go home.

He had as witnesses for himself his father, mother and younger brothers, also the service manager of the garage. After dinner the case was to go to rebuttal. The prosecutor moved at noon to reopen the case. The judge denied this. The prosecutor said this must have happened at some different time. The judge cited some ruling that this absolute date did not make any difference. The prosecutor said that the boy's memory was faulty after the time of the crime because of the dates the fathers of these boys had on the warrants. The jury went out and stayed an hour. Again the judge informed them that the date made no difference they came out and subject says he understands that six were for and six against him. They went back in and he was found guilty in seven minutes. He appealed for a new trial. There was no chance under Judge Simpson's ruling. He then tried to obtain a stay of sentence. He says that Attorney Hueman was not called when the verdict was rendered. An hour later subject was called out and sentenced. He says he didn't know what they were doing. He says he hasn't the finances to take it to the Supreme Court. He has a transcript. There are 89c a page charges for the printing. There is over 150 pages, so another attorney said. It would cost \$300.00 to get it into the Supreme Court. Inmate absolutely denies his guilt or any other date. He says he has been unjustly convicted. Q: Why should these boys bring you up as having done this? A: Well, this man Cook owned a garage and inmate had bought a 1936 V 8 Ford from this man Schneider. He got out of work and was one payment behind on this car. Five days after inmate was in jail Mr. Schneider came and got his car. This Leon Kellogg and this man Schneider work at Cook's garage. Young Cook is one of the complaining witnesses. These two boys testified

on the witness stand that you had committed an act of gross indecency on them. They said he made them play with his privates. In the second warrant they said inmate pushed their heads down toward his privates. They said that both of the boys were with inmate at the same time. They said this happened at about 1:00 a.m., and it was in inmate's car. They said that inmate picked them up in front of a beer garden. That inmate had taken them down town to buy gas and then took them back to Vandercook lake and then drove them out into the country. This Deputy Sheriff and his wife said they picked them up at 1:20 a.m., that morning. Q: Had they set the night as July 30, July 31st or August 2nd and can you prove where you were on these nights? A: Yes, I could. I could prove where they were. This thing came up when I had been working at Albion. A little better than a week before that I had just gone to work for a firm in Albion, Mich. During the testimony they said "did you see this man?" The boys said "yes" he was in a beer garden and he was with a girl. Inmate says the girl was his sister. He was down town that night—not at Jackson but at Vandercook Lake. Mr. Bush: Of all the stories a boy could think of this is the one story that they would pick out to put you in this hell of a mess! The facts, as we are concerned tonight, are that you have incurred a new sentence while on parole and that under the statute we must find you guilty of having violated your parole. I would be inclined to make this an indefinite pass toward your maximum, then if you want to bring any further testimony in this case, you will be at liberty to do so.

Order: This man is passed indefinitely toward his maximum on his old sentence and it is understood by the board that this man either through his own initiative or

through his lawyer will move for a new trial by an appeal to the Supreme Court or bring more tangible evidence before the parole board. Subject forfeits good time prior to date of violation but may earn good time after date of return.

Attest: GERALD F. BUSH (Signed)

Acting Chairman of Parole Board

W. B. CROTTY (Signed)

W. B. Crotty

EXHIBIT "H"

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of June, in the year of our Lord one thousand nine hundred and forty.

Present the Honorable

GEORGE E. BUSHNELL,

Chief Justice,

EDWARD M. SHARPE,

WILLIAM W. POTTER,

BERT D. CHANDLER,

WALTER H. NORTH,

THOMAS F. McALLISTER,

HOWARD WIEST,

HENRY M. BUTZEL,

Associate Justices.

The People of the State of
Michigan,

Plaintiff,

vs

41212½

Cleio Hull,

Defendant.

In this cause a petition is filed by defendant for the allowance of a writ of certiorari, and due consideration thereof having been had by the Court, It is ordered that the petition be and the same is hereby denied.

STATE OF MICHIGAN—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

SEAL

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 15th day of January, in the year of our Lord one thousand nine hundred and forty-one.

JAY MERTZ,

Clerk.

EXHIBIT "I"

STATE OF MICHIGAN }
County of Ingham } ss.

Perry A. Maynard, being first duly sworn, deposes and says that he is the Legal Investigator for the Bureau of Pardons and Paroles, Department of Corrections, State of Michigan, and has full authority to make this affidavit.

Deponent further says, that the attached report of parole violation and the testimony taken at the hearing, as well as the parole certificate attached hereto, are true copies of the originals of these documents and that these copies were prepared at the direction and under the supervision of your deponent.

Deponent further says, that all of these copies have been compared and proof read with the originals and that they are true copies of these documents taken from the files and records of the Bureau of Pardons and Paroles, Department of Corrections, State of Michigan, and that your deponent at present has lawful custody of these files, as far as this matter is concerned.

Deponent further says, that never at any time did petitioner, or any of the institutional officials at the State Prison of Southern Michigan, at Jackson, forward or present to him any pleadings for examination and approval. As a matter of fact, your deponent had no knowledge that petitioner had prepared any pleadings and was contemplating any legal action until he was so informed by the office of the Attorney General of the State of Michigan, on January 14, 1941.

(Signed) PERRY A. MAYNARD

Perry A. Maynard

Subscribed and sworn to
before me this 16th day
of January A.D. 1941.

L. Lois Wellman,
Notary Public, Ingham County, Mich.
My commission expires March 8, 1943

SEAL

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SUPREME COURT OF THE UNITED STATES.

No. —, Original.—OCTOBER TERM, 1940.

Ex parte Cleio Hull.

} Original.

[March 3, 1941.]

Mr. Justice MURPHY delivered the opinion of the Court.

In January, 1936, petitioner was convicted of a statutory sex offense and was sentenced to the Michigan state prison at Jackson, Michigan, for an indeterminate term of six months to ten years. About ten months later he was paroled. In October, 1937, he was convicted of another sex offense and was returned to the same prison to serve a sentence of two and one-half to five years from entry of the second judgment. Apparently for the sole reason that the second conviction was regarded as a violation of his parole, petitioner was given a hearing before the state parole board and was passed indefinitely toward the maximum sentence for the first offense. See Michigan Statutes Annotated, 1940 supplement, § 28.2108.

In November, 1940, petitioner prepared a petition for writ of habeas corpus and exhibits to file in this Court. He took the papers to a prison official and requested him to notarize them. The official refused and informed petitioner that the papers and a registered letter to the clerk of this Court concerning them would not be accepted for mailing. Although the papers were not notarized, petitioner then delivered them to his father for mailing outside the prison but guards confiscated them. Several days later, petitioner again attempted to mail a letter concerning his case to the clerk of this Court. It was intercepted and sent to the legal investigator for the state parole board.¹ Apparently neither of the letters was

¹ About a week later petitioner received the following reply from the legal investigator: "Your letter of November 18, 1940, addressed to the Clerk of the United States Supreme Court, has been referred to the writer for reply. In the first place your application in its present form would not be acceptable to that court. You must file a petition for whatever relief you are seeking and state your reasons therefor, together with a memorandum brief. Your petition must be verified under oath and supported by proper affidavits, if any

returned to the petitioner,² and the papers taken from his father were not returned until late in December.

Petitioner then prepared another document which he somehow managed to have his father, as "agent", file with the clerk of this Court on December 26, 1940. In this document petitioner detailed his efforts to file the papers confiscated by prison officials, contended that he was therefore unlawfully restrained, and prayed that he be released.

On January 6, 1941, we issued a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted. The warden filed a return to the rule setting forth the circumstances of the two convictions, the proceedings of the parole board, and numerous exhibits. In justification of the action preventing petitioner from filing his papers or communicating with this Court, the warden alleged that in November, 1940, he had published a regulation providing that: "All legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals will first have to be submitted to the institutional welfare office and if favorably acted upon be then referred to Perry A. Maynard, legal investigator to the Parole Board, Lansing, Michigan. Documents submitted to Perry A. Maynard, if in his opinion are properly drawn, will be directed to the court designated or will be referred back to the inmate."

In answer, petitioner filed a "Response to the Return" which again challenged the validity of this regulation and which contained numerous exhibits. One of the exhibits was the petition for writ of habeas corpus taken from petitioner's father. In brief, this petition assailed the legality of petitioner's imprisonment under the second conviction on the ground that he had been denied procedural due process.

you have. Your letter was, no doubt, intercepted for the reason that it was deemed to be inadequate and which undoubtedly accounts for the fact that it found its way to my desk."

Apparently the legal investigator serves as attorney and advisor to the state parole board. His functions with respect to legal documents of prison inmates appear more fully from the prison regulation quoted hereafter.

² Neither of the letters reached the clerk of this Court. On December 12, 1940, petitioner requested the prison superintendent of mail to trace the registered letter since he had not received the return receipt which accompanied it. The assistant superintendent replied: "This was mailed thru Perry Maynard by orders from Warden." Apparently the legal investigator made no reply.

The first question concerns the effect of the regulation quoted in the warden's return.

The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine. Compare *First National Bank v. Anderson*, 269 U. S. 341, 346; *Erie Railroad v. Purdy*, 185 U. S. 148, 152; *Carter v. Texas*, 177 U. S. 442, 447; see *Ex parte Sharp*, 33 F. Supp. 464.

However, the invalidity of the prison regulation does not compel petitioner's release. For that reason it is necessary to examine the petition annexed to the response. Although it is here as an exhibit to the response, it may be considered as a motion for leave to file a petition for writ of habeas corpus inasmuch as the warden has not had an opportunity to answer it. The next question, therefore, is whether this petition is premature.

The petition is not premature. Compare *McNally v. Hill*, 293 U. S. 131; *Re Bonner*, 151 U. S. 242. Despite the fact that petitioner is now in prison under the sentence for the first offense, he was at liberty on parole at the time he was arrested and charged with the second offense. True, parole regulations obligated him to stay within Jackson County but that is not the imprisonment present in the *McNally* case. Moreover, petitioner's parole was revoked and he was ordered to serve out his first sentence only because of the second conviction. See *Michigan Statutes Annotated*, *supra*. There is no reason to suppose that he can compel the parole board to review the record of the second conviction, or to make a declaratory ruling that if that conviction is void his parole will be reinstated. Thus the last question is whether the petition, treated as a motion for leave to file a petition for writ of habeas corpus, is sufficient to necessitate an order requiring the warden to answer.

At bottom, petitioner's case is this: that in the second trial there was a variance between pleading and proof with respect to the date when the offense was committed, and that petitioner thus was denied the fair notice of the charge guaranteed by the due process clause. From exhibits and rather vague statements in the petition, the following appears: that in his opening statement and through-

out the trial the prosecutor insisted that the offense occurred on the date charged in the information; that petitioner's defense was that he was elsewhere at the time in question; that some of the testimony tended to fix the date of the offense about a week earlier than that charged in the indictment; that at the close of all the evidence, petitioner's counsel moved for a directed verdict on the ground that there was no evidence to prove that the offense was committed on the date charged in the information; that the trial judge denied this motion and charged the jury that the precise date was immaterial, it being sufficient to show that the offense occurred during the month previous; that the trial judge entered judgment on the jury's verdict of guilty and denied petitioner's motion for a new trial on the same ground urged in the motion for directed verdict; and that the Michigan Supreme Court subsequently denied certiorari.

We conclude that the showing made by the petition and exhibits is insufficient to compel an order requiring the warden to answer. Petitioner was represented by counsel throughout the second trial. Yet there is no claim in the petition that he objected to evidence tending to establish a different date for commission of the offense, or that he claimed surprise, or that he moved for a continuance to enable him to secure other witnesses. He does not allege that at the time of the trial he had an alibi for any other date, nor does he make clear the actual extent of any variance. Furthermore, ascertainment of these facts is impossible since petitioner has not furnished the transcript taken at the second trial. Accordingly, it would be improper to inquire whether petitioner was denied procedural due process in the second trial. Compare *Hardy v. United States*, 186 U. S. 224, 225; *Ledbetter v. United States*, 170 U. S. 606, 612; *Hodgson v. Vermont*, 168 U. S. 262, 271; *Matthews v. United States*, 161 U. S. 500.

The motion for leave to file a petition for writ of habeas corpus is therefore denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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